

In re Interest Abbie L.

Caselaw No.

A-15-996

Filed on

Tuesday, April 26, 2016

SUMMARY: Anthony S. appeals from an order of the Separate Juvenile Court of Douglas County. The Court of Appeals reverses and vacates the Juvenile Court's order granting temporary custody of his child, Eveahla S., to DHHS because of failure to comply with the Nebraska Indian Child Welfare Act (NICWA) requirements, Neb. Rev. Stat. § 43-1501 to 43-1517 (Reissue 2008 & Supp. 2015).

On September 18, 2015, the State filed a petition alleging that Eveahla was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) due to the faults or habits of Omrianna and Anthony, her biological parents. The State was granted temporary custody of Eveahla.

On October 13, 2015, at the first appearance and protective custody hearing, the State sought a continuance because its "ICWA specialist" was not present. Anthony's counsel objected, and asked that the child be returned. The Court overruled the objection, despite evidence that this was likely an ICWA case. The State called its only witness, Stacy Merrell. Merrell acknowledged that her efforts prior to removal did not go beyond reasonable efforts, that Eveahla was eligible for tribal enrollment in the Winnebago Tribe of Nebraska or Crow Nation, and that it would not be safe for Eveahla to return to Anthony. However, she did not believe Eveahla would likely be seriously harmed if placed with Anthony.

Anthony's counsel clarified that for the Court to order foster care placement, that placement must be supported by clear and convincing evidence, including testimony by a qualified expert witness that custody is likely to result in serious emotional or physical damage. Despite information that Eveahla is an Indian child under the Indian Child Welfare Act, and that the requirements of NICWA had not been met, the Court ordered that Eveahla remain with DHHS.

The Juvenile Court found that active efforts had been made to prevent the need for removal, and that continued custody of Eveahla by the parent or Indian custodian was likely to result in serious emotional or physical damage. The Court ordered that Eveahla should remain in the temporary custody of DHHS. Anthony timely appealed the Juvenile Court's order.

Anthony assigns that the Trial Court erred in: (1) failing to find that NICWA applied; (2) "finding that the child could be detained under a NICWA standard when the testimony from the State's only witness, who was not a qualified expert, conceded both that active efforts had not occurred and that the child was not at a risk of imminent physical or emotional harm?"; (3) detaining the child when there was not clear and convincing evidence the child would suffer serious emotional or physical damage if returned to him; (4) finding that the child was at risk of harm, even absent NICWA standards; and (5) finding that active or reasonable efforts would not have prevented the removal of the child.

Statutory interpretation is a question of law that an appellate court resolves independently of

the trial court. *In re Interest of Isabel P. et al.*, 293 Neb. 62 (2016). An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. *Id.*

Guidelines published by the Federal Bureau of Indian Affairs (BIA guidelines) provide that "[i]f there is any reason to believe the child is an Indian child, the agency and State Court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe." 80 Fed. Reg. at 10,152, A.3(d). The Court of Appeals found there was clearly reason to believe Eveahla was an Indian child, and therefore she should be treated as one. Thus, NICWA/ICWA apply to this case, because specific evidence proving her Indian status was not required.

Under NICWA, before an Indian child can be placed in foster care "active efforts" to provide remedial services and rehabilitative programs to prevent breakup of the Indian family or unite them with their child should be made. Neb. Rev. Stat. § 43-1505(4). "Active efforts" requires more than the "reasonable efforts" standard applicable in non-ICWA cases, and at least some efforts should be culturally relevant. *In re Interest of Walter W.*, 274 Neb. 859 (2008); *In re Interest of Ramon N.*, 18 Neb. App. 574 (2010). The "active efforts" standard requires case-by-case analysis. *In re Interest of Walter W.*, *supra*.

The State's witness, Merrell, said her efforts prior to removal did not go beyond reasonable efforts. The Court of Appeals agrees with Anthony and the State that the evidence in the record does not rise to the level of active efforts.

Qualified expert testimony is required under Neb. Rev. Stat. § 43-1505(5) on the issue of whether serious emotional harm or physical damage is likely to occur to the Indian child if not removed from home before other placement may be ordered. See *In re Interest of Shayla H. et al.*, 17 Neb. App. 436 (2009). The BIA guidelines state that a qualified expert witness should have specific knowledge of the Indian tribe's culture and customs. 80 Fed. Reg. at 10,157, D.4. Thus, there was no qualified expert testimony.

Without qualified expert testimony, the Juvenile Court could not order foster care placement for Eveahla. See *In re Interest of Borius H. et al.*, 251 Neb. 397 (1997). The Court of Appeals reverses and vacates the Juvenile Court's order awarding the continued temporary custody of Eveahla to DHHS.
